UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

BRISTOL FARMS

and **Case 21–CA–103030**

KONNY RENTERIA, An individual

Ami Silverman, Esq., for the General Counsel.
Matthew W. Gordon, Esq. (Mattern Law Group)
for the Charging Party.
Denica E. Anderson and Kimberly M. Talley, Esqs. (Sanchez & Amador, LLP)
for the Respondent.

DECISION

STATEMENT OF THE CASE

LISA THOMPSON, ADMINISTRATIVE LAW JUDGE. This is another case raising issues related to *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. granted in part and denied in part 737 F.3d 344 (5th Cir. 2013). It was tried in Los Angeles, California, on June 17 and 18, 2014. Konny Renteria (Renteria or the Charging Party) filed the original charge on April 18, 2013,[1] and filed an amended charge on August 22. The General Counsel issued the complaint November 19. Bristol Farms (the Respondent or Company), filed a timely answer, and later an amended answer, denying all material allegations and setting forth its affirmative defenses.

The complaint alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act), when, (1) by virtue of its written application for employment, Respondent required Renteria to be bound by its Mutual Agreement to Arbitrate (MAA); (2) Respondent enforced the MAA by filing a motion to compel arbitration of Renteria's class-action wage-and-hour lawsuit; and (3) Respondent maintained provisions of the MAA that interfere with employees' access to the Board and its processes.

[1] Abbreviations used in this decision are as follows: "Tr." for Transcript; "GC Exh." for General Counsel's Exhibit; "CP Exh." for Charging Party's Exhibit; "R.Exh." for Respondent's Exhibit; "Jt Exh." for Joint Exhibit; "GC Br." for the General Counsel's brief; "CP Br." for the Charging Party's Brief; and "R Br." for Respondent's brief.

On the entire record and after considering the briefs filed by the Acting General Counsel, the Charging Party, and the Respondent, I make the following.

FINDINGS OF FACT

I. JURISDICTION

Bristol Farms, a corporation with an office and place of business in Carson, California, is engaged in the operation of retail grocery stores. The parties stipulate and I find that it is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent and the Charging Party.

Respondent operates retail grocery stores in the State of California. It also operates a central kitchen, which, along with its corporate headquarters, is located in Carson, California.

Renteria was educated in Mexico, and though their school system does not align perfectly with the United States' education system, she attained the equivalent of a high school diploma. At the time of the hearing, she lived in the United States for about 15 years (since roughly 1999) but had not gone to school in the United States or taken any English classes.

B. Renteria's Application, Orientation, and Arbitration Agreement.

Renteria went to Bristol Farms' Carson facility and filled out an application for employment on November 14, 2006. The application contained a certification, which stated, in relevant part:

> I agree that any offer of employment with Bristol Farms is conditioned upon my entering into an arbitration agreement with Bristol Farms/Lazy Acres, pursuant to which all disputes that might arise out of my employment with Bristol Farms/Lazy Acres, whether during or after that employment, will be submitted to binding arbitration. I understand that consideration of my employment application is conditioned upon my agreement to arbitrate any employment-related dispute with Bristol Farms/Lazy Acres. I understand that this agreement does not alter my status (if hired) as an at-will employee.

(Jt. Exh. 2.) Upon submitting her application, Renteria attempted to speak with Manager Craig Gehr who did not speak Spanish. Gehr summoned Assistant Manager Juvenal Isidoro to translate. At the time, Renteria could speak some basic English though she did not read or understand English beyond a simple conversational level.

Joseph Reichard, a human resources recruiter for Respondent during this time period, was responsible for conducting new employee orientation. The orientation for central kitchen

workers took two to four hours, part of which was spent reviewing and completing paperwork.[2] One of the paperwork items was a mutual agreement to arbitrate (MAA). (Jt. Exh. 4.) According to Reichard, his practice was to read the MAA aloud and tell the employees it was optional. He also told them that if they did not understand the MAA, they could take it with them and have someone explain it.[3] The pertinent provisions of the MAA state:

> It is in the interest of Bristol Farms and its Owners/Partners that, whenever possible, disputes related to employment matters be resolved quickly and fairly. Should any matter remain unresolved, and in consideration of the promises below and your employment with Bristol Farms, you and Bristol Farms agree as follows:
>
> You and Bristol Farms agree that final and binding arbitration shall be the exclusive remedy for any dispute between you and Bristol Farms, except for claims of Workers' Compensation, Unemployment Compensation, or any other claim that is non-arbitrable under applicable state or federal law. Thus, except for claims carved out above, this Agreement includes all common-law and statutory claims, including but not limited to, any claim for breach of contract, unpaid wages, wrongful termination, and for laws forbidding discrimination, harassment, and retaliation on the basis of race, color, religion, gender, age, national origin, disability, and any other protected status. You understand that you are giving up no substantive rights, and this Agreement simply governs forum.

(Jt. Exh. 4.) The MAA then states that the arbitration will be conducted under the rules and procedures of the American Arbitration Association (AAA), and discusses how an arbitrator will be selected, along with the payment and fee structure. The MAA concludes by stating:

> *BY SIGNING THIS AGREEMENT, YOU AND THE COMPANY ACKNOWLEDGE THAT THE RIGHT TO A COURT TRIAL AND TRIAL BY JURY IS OF VALUE, AND KNOWINGLY AND VOLUNTARILY WAIVE SUCH RIGHT FOR ANY DISPUTE SUBJECT TO THE TERMS OF THIS AGREEMENT.*

(Id.) It is silent as to class action claims.

On November 20, 2006, Renteria signed a conditional job offer to work in Respondent's central kitchen as a meat cutter, at a pay rate of $12.50 per hour. (Jt. Exh. 3.) She began work on or about November 28, 2006, starting with an orientation from 9:30 to 12:15. (R. Exh. 5.) Reichard conducted the orientation, though at the time of the hearing he did not specifically recall Renteria being present. During Renteria's orientation, Reichard spoke English and gave her and the other attendees some papers, also in English, to sign. Renteria did not understand everything he was saying, but was under the impression she was to sign the documents given to her. (Tr. 142.) There was not a Spanish version of the MAA, or any of the other documentation, presented at the orientation. Renteria signed the MAA during her orientation on November 28.

[2] The orientation for employees in the retail stores is longer, lasting five to seven hours.

[3] Reichard's practice was the same for the pre-designation form, which was the only other optional form.

Renteria worked in the central kitchen, cutting chicken and beef, and preparing pastas. She generally worked the morning shift, along with about 20 coworkers, supervised by Isidoro. The coworkers spoke to each other and to Isidoro in Spanish.[4]

C. Respondent's Current Application and Orientation.

Since at least October 18, 2012, Respondent has used an application form that differs from the one Renteria completed. (Jt. Exh. 1, ¶ 6.) This application does not contain language conditioning employment upon entering into an arbitration agreement with Respondent. (Jt. Exh. 5.)

At the time of the hearing, Oquilla Jones was store director at Bristol Farms' Hollywood store. She began doing orientations in June 2013 and described her current practice. During orientation, she distributes forms from Human Resources. One of these forms is the mutual agreement to arbitrate (MAA), detailed above. At times, she or one of the participants will read the MAA during the orientation. She informs employees that the MAA is an optional form but does not explain what the ramifications are for choosing to sign it or not to sign it. She collects all the various orientation forms at the end of the orientation class, but if the employees want to consult with someone before turning in the MAA, they can turn it into Human Resources later. Jones maintains a checklist for each employee attending the orientation to verify that an employee has turned in his or her respective forms. She then returns the completed forms she collects to Human Resources. Not all employees sign the MAA, and Jones was not aware of any employee being terminated for failing to sign it.

D. Class Action Complaint and Response.

On August 28, 2012, Renteria, through her attorneys, filed a class action complaint in Superior Court for the State of California. The complaint alleged various claims regarding wages, including a claim under the California Private Attorney General Act of 2004 (PAGA). (Jt. Exhs. 1 ¶ 9(a), 7.) On April 2, 2012, Bristol Farms filed a motion to dismiss Renteria's class complaint, and to dismiss, or in the alternative, compel arbitration of Renteria's individual claims. Renteria responded and Bristol Farms replied. On May 30, 2012, Superior Court Judge Elihu M. Berle granted Bristol Farms' motion to compel arbitration, with the exception of her PAGA claim. (Jt. Exh. 11.) Judge Berle dismissed Renteria' class claims on December 9, 2012. (Jt. Exh. 12.)

E. Observations of Renteria's Communication Skills.

At all relevant times, Lynn Mellilo has been Respondent's senior director of asset management. She saw Renteria a couple times a week and spoke English with her. The regular conversations consisted of niceties, such as "Hello, how are you?" and "How is production today?" (Tr. 184.) They had one longer conversation where Mellilo told Renteria she liked her hat, and they discussed how she likes to wear color to liven up the uniform. Mellilo also spoke with Renteria in 2008, after she had fallen down and sustained an injury in the central kitchen. Mellilo visited Renteria at the hospital to follow up, asked her how she was feeling, whether there was anyone she needed to contact, the types of testing she was having, and the like.

[4] Renteria was terminated in March 2012 for falsifying her time card.

Mellilo never had any difficulty conversing with Renteria in English, though she recalled Renteria used basic words.

In late 2012/early 2013, Renteria worked as a deli clerk and bagger under the supervision of Paul Pewrdaza, store director of Sprouts Farmers' Market in San Pedro, California. Renteria was required to communicate with customers in English for both positions, and he never witnessed her having trouble. He had known her about a year-and-a-half at the time of the hearing.

III. DECISION AND ANALYSIS

The complaint asserts violations of Section 8(a)(1) of the Act. Under Section 8(a)(1), it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

In *D.R. Horton*, slip op. at 1, the Board explained that an employer violates Section 8(a)(1) of the Act by imposing, as a condition of employment, a mandatory arbitration agreement that precludes employees from "filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial." Citing to *Spandsco Oil & Royalty Co*., 42 NLRB 942, 948-949 (1942), *Salt River Valley Water Users Ass'n*, 99 NLRB 849, 853-854 (1952), enfd. 206 F.2d 325 (9th Cir. 1953), and a string of other cases, the Board noted that concerted legal action addressing wages, hours, and working conditions has consistently fallen within Section 7's protections.

A. Renteria's Agreement and Respondent's Enforcement.

Paragraphs 4, 5(b), and 7 of the complaint allege that Respondent violated Section 8(a)(1) of the Act by maintaining the MAA as a condition of the Charging Party's employment, and enforcing it to require individual arbitration of her wage-related claims.

First, I must address whether the MAA was a mandatory condition of Renteria's employment. It is hard to imagine language more clear than the language in Renteria's job application, articulated above and reiterated here:

> I agree that any offer of employment with Bristol Farms is conditioned upon my entering into an arbitration agreement with Bristol Farms/Lazy Acres, pursuant to which all disputes that might arise out of my employment with Bristol Farms/Lazy Acres, whether during or after that employment, will be submitted to binding arbitration. I understand that consideration of my employment application is conditioned upon my agreement to arbitrate any employment-related dispute with Bristol Farms/Lazy Acres. I understand that this agreement does not alter my status (if hired) as an at-will employee.

Clearly, Renteria's employment, by virtue of this clear and unambiguous language, was conditioned upon her agreement to arbitrate "any employment related dispute" with Bristol Farms. I therefore find the agreement was a mandatory rule imposed by Respondent.[5]

Respondent introduced testimony that the employees were orally told, at orientation, that signing the agreement was voluntary. Where language is unambiguous, as here, "Board precedent prohibits the use of parole evidence to vary the terms of the parties' agreement." *Contek International*, 344 NLRB 879, 884 (2005) (citing *Quality Building Contractors*, 342 NLRB 429 430 (2004); and *NDK Corp*., 278 NLRB 1035 (1986)). Respondent points out that the MAA itself ends by stating the employee is knowingly and voluntarily waiving the right to go to court. The consideration for knowingly and voluntarily giving up this right, however, was (clearly and unambiguously) employment with Respondent. I therefore apply the parole evidence rule and decline to consider testimony that Renteria was told signing the agreement was voluntary.[6]

Respondent further argues that the employment application did not incorporate the MAA because it did not specifically reference it. I have considered the cases Respondent cited in its brief, yet none address the situation present here. Simply put, Respondent required Ms. Renteria to sign an application with a provision agreeing that any offer of employment was conditioned upon entering into an arbitration agreement with Bristol Farms. It then presented her with one, and only one, arbitration agreement at her orientation. Respondent's laborious arguments that somehow the former does not incorporate the latter in the present context fall flat in light of the plain language of the documents. Moreover, it is "a cardinal principle of contract construction that a document should be read to give effect to all its provisions and to render them consistent with each other." *Mastrobuono v. Shearson Lehman Hutton, Inc*., 514 U.S. 52, 63 (1995). The provision on the application conditioning employment on signing an arbitration agreement has no effect if, in fact, there is no such condition.

As a mandatory condition of Renteria's employment, as well as those employees who went through the same application and orientation process, the MAA is evaluated in the same manner as any other workplace rule. *D.R. Horton*, supra, slip op. at 5.[7] When evaluating whether a rule, including a mandatory arbitration agreement, violates Section 8(a)(1), the Board applies the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007); *D.R. Horton*, supra. Under *Lutheran Heritage*, the first inquiry is whether the rule explicitly restricts activities protected by Section 7. If it does, the rule is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to [Section 7]

[5] Respondent does not explicitly argue a timeliness defense. Any such argument would lack merit under controlling case law holding that a continuing violation exists as long as the rule is still being enforced at the time of the charge. See *American Cast Iron Pipe Co*., 234 NLRB 1126 fn. 1 (1978); *Alamo Cement Co*., 277 NLRB 1031, 1036–1037 (1985) (no time bar where enforcement allegation could not have been litigated sooner); *The Guard Publishing Co*., 351 NLRB 1110, 1110, fn.2 (2007) ("maintenance during the 10(b) period of a rule that transgresses employee rights is itself a violation of Sec. 8(a)(1).")

[6] Even if parole evidence was admissible, my decision would not change. Reichard did not specifically remember Renteria in an orientation class, and given her limitations with English, I do not think she understood that signing the MAA was voluntary. Rather, when faced with a stack of papers to sign at orientation, she understood she was to sign them.

[7] Respondent claims the MAA is not a work rule because it is voluntary. For the reasons set forth in this decision, I disagree.

activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage* at 647.

I find the MAA violates Section 8(a)(1) because employees would reasonably construe its language to prohibit Section 7 activity and because it has been applied to restrict the exercise of Section 7 rights.

Respondent contends that the MAA is distinguishable from the agreement the Board found unlawful in *D.R. Horton* because it does not contain an express waiver of class and collective actions. Clearly, however, Respondent has applied the MAA to restrict the Charging Party from proceeding with a class action complaint. Indeed, in its motion to dismiss Renteria's class action complaint, the first paragraph in Respondent's statement of facts contains the following heading: "The Parties Entered Into An Enforceable Agreement Requiring Plaintiff To Resolve Her Claims Through Binding Individual Arbitration." (Jt. Exh. 8.) Later, citing to the Supreme Court's decision in *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp*., 130 S.Ct. 1758, 1775–1776 (2010), Respondent argued, successfully, that a party may not be compelled to submit to class arbitration where the agreement is silent as to its permissibility. In its motion to dismiss, Respondent emphasized the singular language of the MAA as being between the individual employee and Bristol Farms, to support its argument that MAA does not authorize class action arbitrations. (Id.) Respondent's attempt to have it both ways is disingenuous. Rather, Respondent construed the singular language of the MAA as prohibiting class arbitration, and I agree that this language, with no reference to the ability to pursue claims about working conditions jointly, would lead an employee to read the MAA as applicable to individual employment disputes. Moreover, it was clearly applied to restrict Renteria's Section 7 activity of pursuing a class action lawsuit regarding wages.

Respondent also asserts that even if the MAA was mandatory, it did not violate the Act, because the use of class action procedures is not a substantive right. The Board, however, has found that participation in a class action is a substantive right protected by Section 7. Respondent further argues that, absent a congressional command to excuse enforcement of the FAA, it must be enforced. Relying on *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 672 fn. 4 (2012), decided a week after *D.R. Horton*, Respondent argues that the Board ignored the requirement of a "congressional command" to override the FAA. The crux of Respondent's argument is that nothing in Section 7 (which was enacted prior to the FAA) excuses application of the FAA. Specifically, Respondent argues that Section 7 provides no substantive right to initiate a class action. Though the Board could not have applied *CompuCredit* when it issued *D.R. Horton*, it nonetheless addressed this argument, stating:

> Any contention that the Section 7 right to bring a class or collective action is merely "procedural" must fail. The right to engage in collective action—including collective *legal* action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest. [Emphasis in original.]

D.R. Horton, supra.[8]

Respondent also asserts that the Board's ruling in *D.R. Horton* interferes with the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 *et. seq.*, based on the Supreme Court's reasoning both in *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740, 1746 (2011), *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp*., 130 S.Ct. 1758, 1775–1776 (2010), and *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 24 (1991). The Board, however, considered these arguments and precedents in *D.R. Horton* to support a different conclusion, by which I am bound.

Respondent argues that the recent Supreme Court decision, *American Exp. Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013), makes clear that it is improper to find a congressional command where none exists. *American Exp. Co.* involved a group of merchants who were unhappy with the rates American Express charged them to use their cards at their respective businesses.[9] At issue before the Court was whether the merchants were bound by agreements mandating individual arbitration of these disputes and precluding a class action suit for violation of antitrust law. The merchants argued that without the ability to proceed collectively, it was not cost-effective to challenge American Express's rates. The Court noted that the laws at issue, the Sherman and Clayton Acts, fail to reference class actions, and found that the "antitrust laws do not guarantee an affordable procedural path to the vindication of every claim." Id. at 2309. The Board in *D.R. Horton* distinguished the NLRA, however, and found that Section 7 substantively guarantees employees the right to engage in collective action, including collective legal action, for mutual aid and protection concerning wages, hours, and working conditions. As such, I find Respondent's argument fails.

Next, relying on *Bill Johnson's v. NLRB*, 461 U.S. 731, 741 (1983), and *BE&K Construction*, 536 U.S. 516 (2002), Respondent argues that the motion to compel arbitration is constitutionally protected by the First Amendment. I find that instant case falls within the exception set forth in *Bill Johnson's* at footnote 5, which states in relevant part:

> It should be kept in mind that what is involved here is an employer's lawsuit that the federal law would not bar except for its allegedly retaliatory motivation. We are not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption, or a suit that has an objective that is

[8] Respondent notes that the Board's refusal to permit a class action waiver is contrary to the Supreme Court's decision in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009). The Board considered this argument, however, and distinguished *14 Penn Plaza*. *D.R. Horton,* supra at 12.

[9] It is a matter of common sense that the merchants could continue to operate their businesses without offering customers the ability to pay with an American Express card. Other forms of currency are available and using American Express was their choice. Likewise, it was the Charging Party's choice to work for Ralph's. Taken to its logical extreme, however, if waivers such as the MBAP are judicially sanctioned and become the norm for employers, employees will increasingly be faced with the option of foregoing class litigation for mutual aid and protection or not working.

> illegal under federal law. Petitioner concedes that the Board may enjoin these latter types of suits. Brief of Petitioner 12-13, 20; Reply Brief for Petitioner 8. Nor could it be successfully argued otherwise, for we have upheld Board orders enjoining unions from prosecuting court suits for enforcement of fines that could not lawfully be imposed under the Act, see *Granite State Joint Board, Textile Workers Union*, 187 N.L.R.B. 636, 637 (1970), enforcement denied, 446 F.2d 369 (CA1 1971), rev'd, 409 U.S. 213, 93 S.Ct. 385, 34 L.Ed.2d 422 (1972); *Booster Lodge No. 405, Machinists & Aerospace Workers*, 185 N.L.R.B. 380, 383 (1970), enforced in relevant part, 148 U.S.App.D.C. 119, 459 F.2d 1143 (1972), aff'd, 412 U.S. 84, 93 S.Ct. 1961, 36 L.Ed.2d 764 (1973), and this Court has concluded that, at the Board's request, a District Court may enjoin enforcement of a state-court injunction "where [the Board's] federal power pre-empts the field." *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144, 92 S.Ct. 373, 377, 30 L.Ed.2d 328 (1971).

The Board has determined that these exceptions apply in the wake of *Bill Johnson's* and *BE&K Construction*. See, e.g., *Allied Trades Council (Duane Reade Inc.*), 342 NLRB 1010, 1013, fn. 4 (2004); *Teamster's, Local 776 (Rite Aid Corp.)*, 305 NLRB 832, 835 (1991). Moreover, particular litigation tactics may fall within the exception even if the entire lawsuit may not be enjoined. *Wright Electric, Inc*., 327 NLRB 1194, 1195 (1999), enfd. 200 F.3d 1162 (8th Cir. 2000); *Dilling Mechanical Contractors, Inc*, 357 NLRB No. 56 (2011). As such, since the Board has concluded in *D.R. Horton* that precluding class or collective actions related to wages, hours, and/or working conditions is unlawful, Respondent's attempt to enforce the MAA in state court by moving to compel individual arbitration fall within the unlawful objective exception in *Bill Johnson's*.

Based on the foregoing, I find the MAA violates Section 8(a)(1) of the Act as alleged in complaint paragraphs 4, 5(b), and 7.[10]

B. Implementation and Maintenance of Arbitration Agreements for Other Employees.

Complaint paragraphs 5(a) and 7 allege that Respondent violated Section 8(a)(1) of the Act when, at all times since at least October 18, 2012, it implemented and maintained a mutual agreement to arbitrate which contains provisions requiring employees to resolve certain employment disputes through arbitration.

The first question that needs to be addressed is whether the MAA was voluntary for those employees who filled out the on-line application that did not contain language conditioning their employment on signing an arbitration agreement. This is because the Board in *D.R. Horton* expressly declined to answer the "more difficult" question of:

> [W]hether, if arbitration is a mutually beneficial means of dispute resolution, an employer can enter into an agreement that is not a condition of employment with an individual employee to resolve either a particular dispute, or all potential

[10] Respondent argues that Renteria is not credible. As my findings do not rest on credibility, I decline to address these arguments. On a related note, however, I do not find persuasive the evidence Respondent presented about Renteria's ability to understand English beyond a basic level in 2006. Evidence of her engaging in conversation during subsequent years does not call into question her unrefuted testimony that her understanding of English was imperfect in 2006.

> employment disputes through a non-class arbitration rather than litigation in court.

D.R. Horton, supra at fn. 28.

Respondent relies on evidence that, at orientation, employees were told the MAA was optional and they could take it home with them and seek advice if they were not clear about its terms. Respondent also provided unrefuted testimony that not all employees signed the agreement, and no employees have been terminated for failing to sign the agreement.

What is troubling, however, is that the document itself does not mention that it is optional, and there is nothing in writing giving employees either the opportunity to "opt in" or "opt out" of the MAA. Instead, it is presented as one of many documents to sign at a lengthy orientation. Orally reading the terms of the MAA and orally informing employees that they are not required to sign the MAA, while the terms of the agreement do not state it is optional, creates unnecessary confusion. The employees are not told the ramifications of signing the MAA or not signing it. Moreover, there is a checklist for each employee that denotes which documents that employee has signed at the completion of orientation. Under these circumstances, I find a reasonable employee would be coerced into signing the MAA.

Respondent cites to several cases where courts have held that opt-out provisions render arbitration agreements voluntary. In these cases, however, the option to opt out of the agreement was apparent from the document itself. There is no such provision in the MAA at issue here.[11]

Accordingly, for the reasons set forth with regard to Renteria's agreement, I find the MAA violates the Act as alleged in paragraphs 5(a) and (7) of the complaint.

C. Effect on Employees' Access to Board and its Procedures.

Finally, the complaint alleges, at paragraphs 6 and 7, that employees would reasonably conclude that the provisions of the MAA interfere with employees' access to the Board and its processes, in violation of Section 8(a)(1).

In evaluating the impact of a rule on employees, the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). A rule does not violate the Act if a reasonable employee merely *could* conceivably read it as barring Section 7 activity. Rather, the inquiry is whether a reasonable employee *would* read the rule as prohibiting Section 7 activity. *Lutheran Heritage,* supra. The Board must give the rule under consideration a reasonable reading and ambiguities are construed against its promulgator. *Lutheran Heritage*, supra at 647; *Lafayette Park Hotel*, 326 NLRB at 828; and *Cintas Corp. v. NLRB*, 482 F.3d 463, 467–470 (D.C. Cir. 2007). Moreover, the Board must "refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Lutheran Heritage* supra at 646.

[11] For this same reason, Respondent's argument based on the non-precedential administrative law judge decision in *Bloomingdale's, Inc.*, 2013 WL 3225945 (June 25, 2013), also fails.

I find a reasonable employee would read the MAA as prohibiting him or her from filing unfair labor practice charges with the Board. On its face, the MAA applies to "any dispute between you and Bristol Farms" with specific exceptions for "Workers' Compensation, Unemployment Compensation, or any other claim that is non-arbitrable under applicable state or federal law." Notably, the MAA does not specifically mention an employees' right to file charges with the Board in its exceptions or elsewhere. Moreover, it expressly encompasses claims for "wrongful termination" as well as "discrimination" based on any "protected status." Thus a reasonable employee would read this to require arbitration for claims of termination based on union or other protected concerted activity, and for claims of discrimination based on the protected status of having engaged in union activity or other protected concerted activity. While the MAA contains a catchall provision excluding "any other claim that is non-arbitrable under applicable state or federal law" this at best creates an ambiguity, which is construed against the Respondent as the MAA's drafter. *Lafayette Park Hotel*, 326 NLRB at 828; *Cintas Corp. v. NLRB*, 482 F.3d 463, 467–470 (D.C. Cir. 2007).

Respondent's argument that, under certain circumstances, the Board has permitted waiver of the right to file charges with the Board, is unavailing. To support its argument, Respondent cites to *BP Amoco Chemical*, 351 NLRB 614 (2007), where the Board found termination agreements that 37 employees signed, which waived their right to file charges with the Board, were valid. In that case, the terminated employees received enhanced severance packages in return for their agreement not to bring legal action against their former employer for any employment-related issues. Unlike in the instant case, the former employees of *BP Amoco Chemical* were being separated from the company, so the waiver was not for potential prospective violations. More importantly, the Board in *BP Amoco Chemical* weighed the factors set forth in *Independent Stave*, 287 NLRB 740 (1987), and found the former employees "were aware of the content, advised of the meaning, and knew that they were waiving and releasing claims." 351 NLRB at 615. Based on the analysis in the paragraph directly above, the situation here is far less clear, and is therefore *BP Amoco Chemical* is meaningfully distinguishable.

D. Board Quorum and Appointment of Regional Director.

Finally, I will address separately Respondent's argument that the complaint at issue here was improperly issued because Regional Director Olivia Garcia was appointed at a time when the Board lacked a quorum. As the Board stated in *Pallet Companies, Inc.*, 361 NLRB No. 33, slip op. at 1 (August 27, 2014):

> Agency staff engaged in the investigation and prosecution of unfair labor practices are directly accountable to the General Counsel. 29 U.S.C. § 153(d); See *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 127-128 (1987); *NLRB v. FLRA,* 613 F.3d 275, 278 (D.C. Cir. 2010). When a Regional Director or other designated Board agent issues a complaint, he acts for, and with authority delegated by, the General Counsel. *United States Postal Service*, 347 NLRB 885, 886 (2006); *Roadway Express,* Inc., 355 NLRB 197, 206 (2010).

Respondent does dispute that the complaint here was issued in the General Counsel's name and under his authority.

In any event, in light of the Supreme Court's decision in *NLRB v. Noel Canning*, *a Division of the Noel Corp.*, 134 S.Ct. 2550 (2014), it appears the Board had a quorum at the time of the complaint, consisting of Members Hayes, Pearce and Becker. Respondent does not contest the validity of Members Hayes and Pearce's appointments. In *NLRB. v. New Vista Nursing & Rehabilitation*, 719 F.3d 203, 218 (3d Cir. 2013), the Third Circuit found that Member Becker's appointment was invalid because it occurred during a 17-day intrasession Senate recess. In *Noel Canning*, however, the Court held that the President's constitutional recess appointment authority extended to intrasession recesses of the Senate. Moreover, the Court's analysis suggests that recess appointments are valid if, among other criteria, the recess lasted 10 days or longer. I find, therefore, that the Board had a quorum at the time the complaint was issued. I further find that the Board had a quorum when *D.R. Horton* was decided by a panel consisting of Members Hayes, Pearce and Becker.

IV. CONCLUSIONS OF LAW

(1) Respondent, Bristol Farms, is an employer within the meaning of Section 2(6) and (7) of the Act.

(2) Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory mutual agreement to arbitrate (MAA), and enforcing that agreement by moving to compel individual arbitration of the Charging Party's class-action lawsuit pertaining to wages.

(3) Respondent violated Section 8(a)(1) of the Act by maintaining mutual agreement to arbitrate that employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have concluded that the MAA is unlawful, the recommended order requires that Respondent revise or rescind it and advise its employees in writing that said rule has been so revised or rescinded. Because Respondent utilized the MAA on a corporate wide basis, Respondent shall post a notice at all locations where the MAA, or any portion of it requiring all employment-related disputes to be submitted to individual binding arbitration, was in effect. See, e.g., *U-Haul Co. of California*, supra, fn. 2 (2006); *D.R. Horton,* supra, slip op. at 17.

I recommend Respondent be required to reimburse Charging Party Renteria for any litigation and related expenses, with interest, to date and in the future, directly related to Respondent's filing its motion to compel arbitration in Case No. BC491186 in the Superior Court of California. Determining the applicable rate of interest on the reimbursement will be as outlined in *New Horizons for the Retarded*, 283 NLRB 1173 (1987)(adopting the Internal Revenue Service rate for underpayment of Federal taxes). Interest on all amounts due to Ms. Renteria shall be computed on a daily bases as prescribed in *Kentucky River Medical Center*, 356 NLRB 8 (2010).

The General Counsel requests that Respondent be required to move the Superior Court of Los Angeles County, jointly with the Charging Party on request, to vacate its order compelling arbitration if a motion to vacate can still be timely filed. The law does not require the employer to permit class action arbitrations. Instead, *D.R. Horton* states that a forum for class or collective claims must be available. It is therefore beyond my authority to require Respondent to permit classwide arbitration. Instead, the employees must be permitted to proceed with class action claims regarding wages, hours and/or working conditions in some forum, whether arbitral or judicial.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[12]

ORDER

Respondent, Bristol Farms, Carson, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) maintaining a mutual agreement to arbitrate that employees would construe as prohibiting class or collective actions;

(b) enforcing the mutual agreement to arbitrate to prohibit class actions;

(c) maintaining a mutual agreement to arbitrate that restricts employees' protected activity or that employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Rescind or revise the mutual agreement to arbitrate to make it clear to employees that the agreement does not constitute a waiver in all forums of their right to maintain employment-related class or collective actions, and that the agreement does not bar or restrict their right to file charges with the National Labor Relations Board.

(b) Notify the employees of the rescinded or revised agreements to include providing them copies of the revised agreements or specific notification that the agreements have been rescinded.

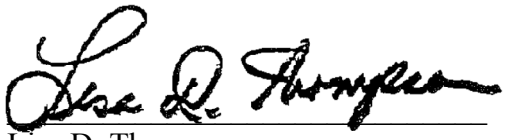
(c) Within 14 days after service by the Region, post at its facility in Carson, California, and in all facilities where it has maintained and/or enforced the mutual agreement to arbitrate,

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 2011.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: Washington, D.C., October 17, 2014



Lisa D. Thompson
Administrative Law Judge

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce a mutual agreement to arbitrate that requires all employment-related disputes to be submitted to individual binding arbitration.

WE WILL NOT enforce a mandatory arbitration program by requiring Charging Party Konny Renteria to agree to the mutual agreement to arbitrate.

WE WILL NOT enforce a mandatory arbitration program by asserting it in class-action litigation regarding wages the Charging Party Konny Renteria brought against us.

WE WILL NOT maintain a mandatory arbitration policy that employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL rescind or revise the mutual agreement to arbitrate to make it clear to employees that the agreement does not constitute a waiver of their right in all forums to maintain class or collective actions and does not restrict employees' right to file charges with the National Labor Relations Board.

WE WILL notify employees of the rescinded or revised mandatory arbitration program, including providing them with a copy of any revised agreements, acknowledgement forms or other related documents, or specific notification that the agreement has been rescinded.

WE WILL reimburse Charging Party Konny Renteria for any litigation expenses: (i) directly related to opposing the Respondent's Motion to Compel Arbitration; and/or (ii) resulting from any other legal action taken in response to Respondent's efforts to enforce the arbitration agreement to require individual arbitration.

WE WILL ensure the Charging Party Konny Renteria has a forum to litigate her class complaint by either moving the Superior Court of Los Angeles County, jointly with the Charging Party upon request, to vacate its order compelling arbitration, or permitting her claims to be arbitrated on a class-wide basis

BRISTOL FARMS

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1400, Phoenix, AZ 85004-3099

(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/21-CA-103030 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 640-2146.